90-746

No.

IN THE

Supreme Court of the United States

October Term, 1990

WILLIAM KUNTZ, III,

Petitioner,

against

THE LITTLE MIAMI RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO.

Corrected Petition for a Writ of Certiorari

WILLIAM KUNTZ, III
Pro Se
Box 1722, Broadway Station
Albany, NY 12201-1722
(518) 962-4966

Old Arsenal Hill
Westport, NY

Dated: November 7, 1990

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(4348)

Question Presented.

That the Court of Appeals for the Eight District of Ohio at Cleveland denied petitioner equal protection under the United States Constitution between the citizens of the various states by the application of a Local Rule of Court in dismissing his appeal from the Common Pleas Court of Cuyahoga County, Ohio.

Table of Contents.

Index to Appendix.

TABLE OF AUTHORITIES.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

WILLIAM KUNTZ, III,

Petitioner,

against

THE LITTLE MIAMI RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The order of the Supreme Court of Ohio dated June 27, 1990, is printed herein as Appendix A. The opinion of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, dated February 5, 1990, is printed herein as part of Appendix C. The opinions of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga,

dated March 12, 1990, are printed herein as Appendices D, E and F.

Jurisdiction of the Court.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257.

Sua sponte Order of the Court of Appeals dismissing petitioners appeal dated February 15, 1990.

Order for reinstatement denied March 12, 1990.

Motion for leave to appeal to the Supreme Court of Ohio dismissed June 27, 1990.

Petitioner first raised the federal question of equal protection in his motion before the Supreme Court of Ohio.

Statement of the Case.

Petitioner is an individual resident of the State of New York. Respondent Little Miami Railroad is a subsidiary of the Penn Central Corporation.

This case stems from one of the 'rich uncle' cases of the modern bankruptcy era. *In the Matter of Penn Central Transportation Company, debtor.* United States District Court for the Eastern District of Pennsylvania, Case 70-347.

Petitioner was a minority shareholder of the Little Miami Railroad Company. Little Miami, the respondent, was a leased line of Penn Central owning track and property between the Ohio River in Cincinnati, Ohio, and downtown Columbus, Ohio, and various points between

including, Dayton, Xenia and to Richmond, Indiana. After the settlement of the conveyance case framework which led to the formation of Consolidated Rail Corporation, a/k/a Conrail, and the conveyance by deed of almost all of Penn Central's Rail assets, including portions of Little Miami Railroad property, it was discovered that Penn Central did not own 100% of the outstanding shares of Little Miami Railroad. As a result of an analysis on behalf of the debtor Penn Central, it was concluded that an acquisition of Little Miami would enhance the payment to Penn Central in the valuation case which would determine the actual value of the assets which were conveyed to Conrail.

Accordingly, on June 25, 1979, a petition was heard before the Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, who presided over the Penn Central case, for an approval to implement a settlement with Little Miami. Little Miami had never been in bankruptcy and remained solvent during the pendency of the Penn Central case. All the officers and directors of Little Miami were directly or indirectly employee's of Penn Central.

Petitioner attended said hearing and objected to the proposed settlement as under-valued with regards to the assets of Little Miami Railroad. It was pointed out to the Court that the settlement provided for appraisal rights under Ohio Law. The Bankruptcy Court approved the settlement over the objection of petitioner observing that dissenters have the right to ask for fair market value pursuant to Ohio statutes.

Several months later, petitioner returned to Philadelphia and voted his shares against the proposal at a special meeting of the shareholders. Subsequent to that peti-

tioner made a demand upon the corporation for the fair market valuation of his shares based on his knowledge, respondent rejected petitioner's demand and, on January 15, 1980, petitioner filed his complaint in the Common Pleas Court of Cuyahoga County, Ohio, in Cleveland. Due to the Arcane Provision of Ohio Law, the complaint had to be filed in the county where the 'company' maintained its office, in this case c/o Prentice Hall Corporation, a company which accepts process service. All of Little Miami Railroads assets were located some 120 miles south between Columbus, Ohio and Cincinnati, Ohio and points between.

As illustrated by the appearance and execution Docket of the Common Pleas Court (Appendix I), a trial commenced June 3, 1983, to consider the appraisal made by the person selected by respondents and approved by the Court. In September, three months after the commencement of the trial, respondent moved to continue the trial and moved to take the disposition of petitioner's expert witness.

Over the next seven years, respondents never in fact took the disposition of petitioner's witness, notwithstanding the fact that that witness maintained offices in the same county as respondent's lead counsel. Over the next seven years, petitioner's trial counsel, Michael J. McDonald, was required to make several needless trips to Cleveland from Dayton, Ohio, where he maintained his office. (Appendix I). In late November, 1989, on the verge of the resumption of the trial, respondents filed a motion to dismiss for failure of the petitioner's part to prosecute the case.

In New York Parlance, the motion was "slow pitched" to petitioner's counsel, i.e, express mail to the Court in

Cleveland, and certified mail to Mr. McDonald who, by virtue of being a sole practioner, did not have a large staff to run to the Post Office to pick up certified mail.

As a result, the moving papers were not even obtained by trial counsel for petitioner until respondent's motion was granted.

Upon learning that an order dismissing the case had been entered, petitioner immediately filed a Notice of Appeal to the Court of Appeals of Cuyahoga County, Ohio Eight Appellate District.

The Court of Appeals dismissed the appeal sua sponte for failure to comply with a local rule of Court.

The gist of petitioner's assignment of error to the court is that by the operation of the Local Rule of the Court of Appeals of Cuyahoga County, equal protection is not afforded to citizens of other states as would be available in say the Second Appellate District of Ohio.

Petitioner is not seeking the treatment that he might obtain in New York Courts, instead he is seeking equal treatment in each Court in Appellate Review in Ohio.

Petitioner was required to perform as additional act, i.e., file a praecipe with the clerk under the local rule which was not required under the Ohio Rules of Civil Procedure.

Such an oversight, once petitioner learned of the local rule, was corrected.

The question of technical failure to comply with Local Rules in Ohio has been considered in *O'Brien v. Stein*, 47

Ohio App. 3D 191, appellate procedure, technical failure to comply with local rules not ground for dismissal.

That case relied upon the reasoning in *Dehart v. Aetna Life Insurance Company,* (1982), 69 Ohio St. 2D 138, 230.0 3D 210, 431 N.E.2D 644.

> "All of the documents relevant to the disposition of this appeal are contained in the record. As such, dismissal of this appeal for such a technical reason would be inconsistent with the policy of deciding cases on their merits."

Further the application of such a rule would deny petitioner equal protection under the federal constitution.

Except for the quirk in Ohio law that the case be brought in the county where the agent for service maintained its office, the action would have been in one of the southern Ohio Counties, where the Little Miami Railroad owned property and track.

Needless to say it was a clever stratagem on respondent's behalf to select a forum which had little relation to the company in question aside from being within the same state but removed by hundreds of miles from the real estate.

It would be difficult if not impossible to convince a Common Pleas Court Judge in Cincinnati, Ohio [Hamilton County] that Little Miami's shares were of little value when the company owned land in downtown Cincinnati. It would also be difficult to convince a judge in Columbus, Ohio [Franklin County] that Little Miami shares were of little value where respondent had sold air rights over track to Nationwide Insurance for the con-

struction of a high rise and convention center in downtown Columbus, Ohio.

As the Court may see, petitioner by the terms of the order received -0-. Not one cent for his shares.

If this Court declines to review this case, aside from the tangential issue of possible securities fraud by Penn Central in that the appraiser disclosed that Penn Central had failed to disclose the pending sale of 53 miles of right of way to the Ohio Department of Natural Resources in the proxy statement, an issue which would not be ripe for litigation until this shareholder valuation is disposed of: The only practical recourse aside from one possible motion in State Court if filed before December 1990, would be to return to the United States District Court in Pennsylvania and present the problem to the District Court for its consideration.

It would be inequitable and unfair for respondent, who has held petitioner's money for 14 years, to keep it without paying the minimal value plus interest as determined by the appraiser, much less the higher value ascribed by petitioner of Little Miami's stock.

Wherefore, petitioner respectfully requests the Court grant said petition.

WILLIAM KUNTZ, III
Pro se
Box 1722, Broadway Station
Albany, NY 12201-1722
518-962-4966

Appendix A—Order of the Supreme Court of Ohio Dated June 27, 1990.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: June 27, 1990

Case No. 90-628

ENTRY

WILLIAM KUNTZ, III,

Appellant,

v.

THE LITTLE MIAMI RAILROAD COMPANY,

Appellee.

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by William Kuntz, III.

(Court of Appeals No. 59136)

THOMAS J. MOYER
Chief Justice

Appendix B—A Memorandum in Support of Motion for Leave to Appeal from the Court of Appeals of Cuyahoga County, Ohio—8th Appellate District at Cleveland, Ohio.

IN THE

SUPREME COURT OF OHIO AT COLUMBUS, OHIO

WILLIAM KUNTZ, III *Pro Se,*
Plaintiff-Appellant,

vs.

LITTLE MIAMI RAILROAD COMPANY,
Defendant-Appellee.

Case No. 90-628

William Kuntz, III, Plaintiff-Appellant *Pro Se,* Box 1722—Broadway Station, Albany, NY 12201-1722, 518-962-4966.

April 13, 1990 Friday

TABLE OF CONTENTS.

STATEMENT OF THE FACTS

Plaintiff, William Kuntz, III appealing *pro se* is a resident of the State of New York and a shareholder of the defendant, Little Miami Railroad Company.

Defendant, Little Miami Railroad Company, was a leased line of the former Penn-Central Transportation Company which entered bankruptcy in early 1973. Defendant, Little Miami Railroad Company is an Ohio corporation which was chartered in the early 1800's and owns railroad lines and right-of-ways between Cincinnati, Ohio, Dayton, Ohio, Richmond, Indiana, Xenia, Ohio and Columbus, Ohio including such properties as parts of the ground-lease of the Nationwide Plaza in Columbus, Ohio and property along the Ohio River in downtown Cincinnati.

In the late 1970's as part of a plan to reorganize the affairs of Penn-Central (now Penn-Central Corporation located in Cincinnati, Ohio) parts of the rail assets of the debtor were spun off with the assistance of federal help to form Conrail. Subsequent to that Penn-Central proposed to acquire the rest of the outstanding shares of little Miami-Railroad Corporation.

Plaintiff-appellant dissented from said merger and opted to take his claim for the fair value of his shares to court under Ohio law. In accordance with the requirements, plaintiff-appellant appearing thru trial counsel filed an action in the Common Pleas Court of Cuyahoga County, Ohio in 1980. There the case languished for some 10 years for reasons which may be clear from the record of the case *William Kuntz, III vs. Little Miami Railroad Company* Cuyahoga County Common Pleas Court, Case 80-07544. Plaintiff's counsel was required to make a great number of trips to Cleveland, Ohio from Dayton, Ohio where he maintains his individual law practice. The defendants engaged two law firms of some note, one being in Cincinnati, Ohio and the other being in Cleveland, Ohio.

In November 1989, in what might be termed an *ex parte* motion, defendants sought and obtained a dismissal of the case. From that dismissal, plaintiff-appellant filed a Notice of Appeal and from that appeal this Memorandum in Support is presented to reverse the dismissal of the Court of Appeals.

PROPOSITION OF LAW NO. 1

THAT THE OPERATION OF THE LOCAL RULE OF THE COURT OF APPEALS OF CUYAHOGA INCONSISTENT WITH THE REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION OF THE UNITED STATES BE DEEMED VOID.

Soon after filing his Notice of Appeal, The Court of Appeals of Cuyahoga County, Ohio (8th Appellate District) dismissed the appeal (Case 59136) *sua sponte* for failure to abide by Appellate Local Rule 4(a).

Local Rule 4(a) provides

> 'The Clerk of the Trial Court shall not prepare and assemble the documents constituting the Record on Appeal, as defined in Appellate Rule 9(a), unless and until appellant has filed a Praecipe. If the appellant fails to file a Praecipe within 10 days of filing the Notice of Appeal in the Trial Court, it will be grounds for dismissal of the appeal . . .'

The Record in the Court of Appeals and in the Motion for Reinstatement by plaintiff-appellant indicates that the Praecipe was filed as soon as plaintiff-appellant learned of the different requirement under the local rule of court from those appeals that he has taken from the Court of Appeals of Montgomery County, Ohio and in any event was within two days of the entry of dismissal. Needless to say, copies of the local rules of the Cuyahoga Court of Appeals are not plentiful in New York State and thus occasioned the short delay in compliance with the local rule.

> 'The foreword of the local rules of the Eighth Appellate Judicial District provides that . . . these local rules cannot, and are not intended, to do more than supplement the Ohio Rules of Appellate Procedure in appeals to this court. . . .'

Ohio Rule of Appellate Procedure 10 (b) provides that

> 'The Clerk of the Trial Court shall prepare the certified copy of the docket and journal entries of the case pursuant to Rule 9(d) . . . and transmit the Record upon Appeal to the Clerk of the Court of Appeals . . .'

ARGUMENT

The Federal Constitution of the United States provides that there be equal protection among the citizens of the various states.

In this case, plaintiff-appellant, a resident of the State of New York, finds his case dismissed due to the operation of a local rule of court which operates in Cleveland, Ohio. The local rules of the Court of Appeals for Montgomery County, Ohio (2nd Appellate District) have no rule which equates to the rule in Cleveland, Ohio. Accordingly the oversight of a local rules which by admission 'therefore, the rules are not designed to provide a comprehensive scheme of local practice. Rather, they complement the rule structure of the Ohio Rules of Appellate Procedure' (foreword 8th district local rules)

Accordingly aside from the harsh and unjust result which flowed from the trial court dismissal of a *'ex parte'* motion (the record indicates that the motion took some 21 days to reach plaintiff-appellant's trial counsel if from Cincinnati, Ohio to Dayton, Ohio and that the motion papers were sent from Cincinnati, Ohio to Cleveland overnight by express service) is only further compounded by the operation of a local rule of court.

While plaintiff-appellant can understand the need as an administrative labor saving device by the courts in Cleveland which must have a heavy caseload, the operation of a local rule with such drastic effect cannot withstand the requirements of the federal constitution.

Needless to say, the procedures in New York for appellate review are some what different in what courts of appeals require to perfect all appeals. It is clear that the New York courts are uniform from division to division with the requirements which afford equal protection under the federal constitution. Accordingly plaintiff-appellant submits that the operation of the local rule of Cuv-

ahoga County Court of Appeals (8th district) effectively denies equal protection and accordingly the court should grant review.

Respectfully submitted,

WILLIAM KUNTZ, III
Box 1722
Broadway Station
Albany, NY 12201-1722
518-962-4966

Filed Apr. 16, 1990
MARCIA J. MENGEL, Clerk
Supreme Court of Ohio

Notice of Appeal From the Court of Appeals to the Supreme Court of Ohio (Certified).

IN THE
COURT OF APPEALS OF CUYAHOGA
COUNTY, OHIO
EIGHTH DISTRICT

WILLIAM KUNTZ, III,
Plaintiff-Appellant,

vs.

THE LITTLE MIAMI RAILROAD COMPANY,
Defendant-Appellee.

Case No. 59136

Now comes plaintiff-appellant, William Kuntz, III appearing *pro se* of Albany, NY and files this timely Notice of Appeal from the final entry of the Court of Appeals entered on or about 2/15/90, to the Ohio Supreme Court.

Plaintiff-appellant believes that this case involves substantial constitutional questions with regards to shareholders rights and the law of Ohio for shareholders valuation actions.

Respectfully submitted,

WILLIAM KUNTZ, III
Pro Se
Box 1722-Albany, NY 12201-1722
518-962-4966

Filed Court of Appeals
Mar. 10, 1990
GERALD E. FUERST
Clerk of Courts
Cuyahoga County, Ohio

CERTIFICATE OF SERVICE OF THE NOTICE OF APPEAL

I hereby certify that a copy of the foregoing Notice of Appeal was mailed US Postage prepaid by depositing same in a sealed wrapper in an official depository of the US Postal Service this 14th of March, 1990 addressed to: Mr. John J. McCoy, Taft Stettinius and Hollister, 1800 Star Building, 425 Walnut Street, Cincinnati, Ohio 45202 & Stacy D. Ballin, Squire Sanders and Dempsey, 1800 Huntington Building, Cleveland, Ohio 44115.

WILLIAM KUNTZ, III

Journal Entry, Cuyahoga County Court of Appeals (Certified).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136
Lower Court No. CP 07544, Common Pleas Court
Motion No. 00845

WILLIAM KUNTZ, III,
Appellant,
vs.
LITTLE MIAMI RAILROAD COMPANY,
Appellee.

JOURNAL ENTRY

Date 02/05/90

Appeal dismissed *sua sponte* at Appellant's costs for failure to file Praecipe in accordance with Local Rule 4. Mandate to issue.

Presiding Judge
JOHN T. PATTON, C.J.

KRUPANSKY, J., Concurs

Copies mailed to Counsel for all parties—costs taxed.

GERALD E. FUERST, Clerk of Courts
By J. Cautenanal Deputy

Received for Filing
Feb. 5, 1990
GERALD E. FUERST, Clerk
By J. Cautenanal Dep.

Pursuant to Rule 22(D) and Rule 26, Ohio Rules of Appellant Procedure, this decision will be journalized and will become the judgment and order of the court and the time period for review will begin to run, unless a motion for reconsideration with supporting brief is filed within ten (10) days from this announcement of the Court's decision.

The State of Ohio,)
ss.
Cuyahoga County)

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal Court of Appeals Vol. 267 pg. 940 dated February 15, 1990 case #59136 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Court of Appeals Vol. 267 pg. 940 dated February 15, 1990 and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 11th day of April A.D., 1990.

GERALD E. FUERST, Clerk of Courts
By Nora K. Killerne, Deputy Clerk

Certificate of Service

I hereby certify that a copy of the foregoing motion to certify and memo was mailed US Postage prepared by depositing same in a sealed wrapper in the state of New York in an official depository of the US Postal Service this 13th of April, 1990 addressed to counsel for the defendant-appellant Little Miami Railroad Company who are:

JOHN J. McCOY, Esq.
Attorney-at-Law
Taft, Stettinius & Hollister
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
1 (513) 381-2838

&

STACY D. BALLIN, Esq.
Attorney-at-Law
Squire, Sanders & Dempsey
1800 Huntington Building
Cleveland, Ohio 44115

WILLIAM KUNTZ, III

Appendix C—Decision of Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County.

Case 59136 Date 02/05/90

WILLIAM KUNTZ, III,
vs.
LITTLE MIAMI RAILROAD COMPANY.

Appeal dismissed *sua sponte* at appellant's costs for failure to file Praecipe in accordance with Local Rule 4, Mandate to Issue.

PATTON, C.J.,

KRUPANSKY, J., Concur

From:

Court of Appeals of Ohio
Eighth Appellate District
Cuyahoga County Court House
One Lakeside Ave.
Cleveland, Ohio 44113

To:

Kuntz, William III
P.O. Box 1722
Broadway Station
Albany, New York 12201-1722

Feb. 15, 5:47 PM '90

Appendix D—Final Entry (Motion No. 01797).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136
Lower Court No. CP 07544 Common Pleas Court
Motion No. 01797

WILLIAM KUNTZ, III,
Appellant,

vs.

LITTLE MIAMI RAILROAD COMPANY,
Appellee.

JOURNAL ENTRY

Date 03/12/90

Motion by Appellee to dismiss appeal is denied as moot.

Presiding Judge
DAVID T. MATIA

DYKE, J., Concurs

Received for Filing
Mar. 12, 1990
GERALD E. FUERST, Clerk
By J. Cautenanal Dep.

Appendix E—Final Entry (Motion No. 01565).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136
Lower Court No. CP 07544 Common Pleas Court
Motion No. 01565

WILLIAM KUNTZ, III,

Appellant,

vs.

LITTLE MIAMI RAILROAD COMPANY,

Appellee.

JOURNAL ENTRY

Date 03/12/90

Motion by Appellant to extend time to file assignments of error and brief is denied as moot.

Presiding Judge
DAVID T. MATIA

DYKE, J., Concurs

Received for Filing
Mar. 12, 1990
GERALD E. FUERST, Clerk
By J. Cautenanal Dep.

Appendix F—Final Entry (Motion No. 01555).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Gerald E. Fuerst, Clerk of Courts

Court of Appeals No. 59136
Lower Court No. CP 07544 Common Pleas Court
Motion No. 01555

WILLIAM KUNTZ, III,

Appellant,

vs.

LITTLE MIAMI RAILROAD COMPANY,

Appellee.

JOURNAL ENTRY

Date 03/12/90

Motion by Appellant for reinstatement is denied.

Presiding Judge
DAVID T. MATIA

DYKE, J., Concurs

Received for Filing
Mar. 12, 1990
GERALD E. FUERST, Clerk
By J. Cautenanal Dep.

Appendix G—Motion of The Little Miami Railroad Company to Dismiss.

IN THE

COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO

WILLIAM KUNTZ,

Plaintiff,

v.

LITTLE MIAMI RAILROAD CO.,

Defendant.

Case No. 80-07544
(Judge Timothy McMonagle)

Little Miami Railroad Company ("Little Miami") hereby moves the Court to dismiss Plaintiff's complaint, at Plaintiff's costs, as the result of Plaintiff's complete disregard of this Court's chambers order of August 7, 1989 and its formal written order of October 6, 1989 (*copy attached*).

In support of this motion, Little Miami refers to the following memorandum and the attached Affidavit of John J. McCoy.

MEMORANDUM

On August 7, 1989 during a pretrial conference personally attended by counsel of record, the Court ordered

Plaintiff's counsel to forward Plaintiff's original trial exhibits (over 200 in number) to Defendant's counsel's office by no later than September 8, 1989 and to forward a list of trial exhibits in the order that Plaintiff intended to use them at trial. Further, Plaintiff was ordered to make Mr. Pike Levine, Plaintiff's expert, available at Plaintiff's costs for deposition at Defendant's counsel's office prior to November 8, 1989. Each of these steps was necessary to the parties' and the court appointed appraiser's preparation for the hearing on confirmation of appraiser's report in this case. By journal entry dated October 6, 1989, this Court confirmed each of the foregoing mandates in written form. See October 6, 1989 order (attached hereto as Exhibit A).

The background which led to the need for this order included Plaintiff's repeated violations of the local rules of Court as well as disregard of prior orders issued by the Court regarding disclosure of experts, provision of expert reports, disclosure and listing of trial exhibits, etc. *See e.g.*, Motion of The Little Miami Railroad Company to Preclude The Offer of Expert Testimony By Plaintiff, filed May 4, 1983.

Consistent with a continuing practice of disregard for this Court's orders, Plaintiff has now failed to deliver the trial exhibits to Defendant's counsel office, has failed to provide a list of trial exhibits, and has failed to produce Plaintiff's expert, Mr. Pike Levine, for deposition prior to the deadlines set by the Court. Affidavit of John J. McCoy, Esq., par. 4.

By letter dated September 29, 1989, Defendant's counsel reminded Plaintiff's counsel of the Court's August 7, 1989 order and the fact that Plaintiff had failed to meet the September 8 deadline for providing trial exhibits and an exhibit list. The letter requested that these materials be forwarded promptly and also reminded Plaintiff's counsel that Mr. Pike Levine was required to be produced by No-

vember 8, 1989. A copy of the September 29, 1989 letter is attached to the McCoy Affidavit as Exhibit 1.

By letter dated October 11, 1989, Defendant's counsel enclosed a copy of this Court's written entry (dated October 6, 1989) confirming the August 7, 1989 order. This letter advised Plaintiff that he was in violation of the September 8 deadline by over thirty days and advised that appropriate relief would be requested from the Court if compliance was not forthcoming. A copy of the October 11, 1989 letter is attached to the McCoy Affidavit as Exhibit 2.

Notwithstanding the foregoing "reminders," through today's date the trial exhibits have not been received, the trial exhibit list has not been received, and Mr. Pike Levine has not been produced for deposition. In each of these respects, Plaintiff is in violation of this Court's August 7 order, as confirmed by its October 6, 1989 journal entry.

Civil Rule 37(B)(2)(c) provides that the Court, upon failure to obey a court order to provide or permit discovery, may enter

> An order striking out pleadings or parts thereof or staying further proceedings until the order is obeyed, or *dismissing the action or proceeding* or any part thereof, or rendering a judgment by default against a disobedient party . . . (Italics added).

Because of Plaintiff's continuing failures despite repeated reminders, the only appropriate sanction is dismissal of the action, at Plaintiff's costs. As a result, Defenant Little Miami Railroad Company requests that this Court enter an order dismissing this action.

JOHN J. McCOY
Counsel for Defendant Little Miami
Railroad Company
John J. McCoy, Esq.
Taft, Stettinius & Hollister
1800 Star Bank Center
Cincinnati, OH 45202
(513) 381-2838

STACY D. BALLIN
Counsel for Defendant Little Miami
Railroad Company
Stacy D. Ballin, Esq.
Squire, Sanders & Dempsey
1800 Huntington Bldg.
Cleveland, OH 44115
(216) 687-8523

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the Motion of The Little Miami Railroad Company to Dismiss, memorandum in support and affidavit upon counsel for Plaintiff Michael J. McDonald, Esq. by certified mail this 13th day of November, 1989.

JOHN J. McCOY

The State of Ohio
Cuyahoga County ss.

I, Gerald E. Fuerst, Clerk of The Court of Common Pleas, within and for Said county, hereby certify that the above and foregoing is truly taken and copied from the original Motion of the Little Miami, etc . . . Case No. 80-07544. Now on file in my office. Filed November 14, 1989. Witness my hand and seal of said court this 10th day of December A.D. 1989.

GERALD E. FUERST, Clerk
By: KAREN FRANCE, Deputy

Appendix H—Journal Entry Dated December 8, 1989.

Dec. 8, 1989

Case No. 7544
Assigned Judge: T.E. McMonafe
William Kuntz vs. Little Miami Railroad Co.

(x) Final
(x) Post Card

Date 12/1/89 (*Nunc Pro Tunc* Entry as of & For

Motion of the Little Miami Railroad Company to dismiss is granted. OSJ.

T.E.M.
Judge

RECEIVED FOR FILING
Dec. 8, 1989
GERALD S. FUERST, Clerk

VOL. 1210, PG. 916

The State of Ohio,)
ss.
Cuyahoga County)

I, GERALD E. FUERST, Clerk of the Court of Common Pleas within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original Vol. 1210, pg. 916 dated December 8, 1989 now on file in my office.

Witness my hand and seal of said court this 8th day of February A.D., 1990.

GERALD E. FUERST, Clerk
By Sharla Sasnospos, Deputy

Appendix I—Excerpts From Appearance and Execution Docket.

APPEARANCE AND EXECUTION DOCKET

020 Bernard Friedman, Judge C 07544—80

Attorney: Michael J. McDonald
1200 American Building
Dayton, Ohio 45402
228-7183

Parties: William Kuntz, III
P.O. Box 926
Dayton, Ohio 45401

vs.

Little Miami Railroad Company
c/o Prentice-Hall Corporation Systems, Inc.
Union Commerce Building
Cleveland, Ohio 44115

STATEMENT OF PROCEEDINGS

#1690
Jan. 15, 1980: Complaint filed and summons to be sent by certified mail to defendant.

Jan. 25 1980
Certified mail receipt 412 20671
Returned by U.S. Postal Dept. Little Miami
Received by Addressee 1-21-80 $1.50

Feb 11 1980
Answer of Def. filed.

March 10 1980 Stein

Oct 14 1980 Request for Production of Documents Filed by pltf.

To Court: Oct 15 1980
Parties to agree on app. of appraiser OLB 11-14-80.

Civil Journal 516 Pg 116

Nov 14 1980 Motion for extension of time filed by deft.

Nov 24 1980
Response to pltf's request for production of documents filed by deft.

Dec 17 1980
Deft. selection of an appraiser filed.

To Court: Dec 8 1980
Ext to 11-30-80

Civil Journal 523 Pg 427
Jan 12 1981
Motion to compel (illegible) filed by pltf.

Jan 12 1981
Objection to appraiser filed by pltf.

Jan 16 1981
Motion for costs filed by deft.

Jan 16 1981
Memorandum in opposition to motion to compel filed by deft.

Jan 16 1981
Memorandum in support of its selection of an appraiser filed by deft.

To Court: Jan 21 1981
Motion to compel GRTD OSJ

Civil Journal 528 Pg 877

To Court: Feb 19 1981
Motion to compel by pltf is denied. Sanctions also denied to defts.

Civil Journal 533 Pg 744

Apr 10 1981
Interrogatories of deft filed.

To Court: Sep 1 1981
Mr. E. Halsey Sanford is appointed appraiser.

Civil Journal 560 Pg 980

Oct 01 1982
Appraisal report . . . filed

Jan 20 1983
Pltf pretrial statement filed.

Jan 27 1983
Pre-trial statement filed by dft.

To Court: Apr 15 1983
Set for hearing 6/2/83. O.S.J.

Civil Journal 650 Pg 943

May 04 1983
Motion to preclude offer filed by Little Miami RR.

May 27 1983
(illegible) for witness subpoenae filed by pltf.

May 27 1983
Subpoena for Robert Roderer filed by pltf.
2) P. Levine
3) Jim Reinolk
4) Jefferey Nogauich
5) George Stanforth
6) William Ericson

Jun 02 1983
Memorandum in support of appraisal filed by deft.

Sep 12 1983
Notice of deposition filed by dfdt.

Sep 15 1983
Deft. files motion for continuance

Dec 16 1985 to Court
P. T. set 2-5-86 @ 1:30

Civil Journal 831 Pg 338

Sep 18 1983
Transcript filed by Penn Central Corp.

To Court: Dec 24 1986
Transferred to Judge Wm. E. Mahon
Journal 914-543

To Court: Apr 20 1988
P.T. set for 5-25-88 10:30 AM

Civil Journal 1040 Pg 454

To Court: June 14 1988
Transferred to Tim McMonagle

Civil Journal 1056 Pg 171

9/19/88
Prospectus of Penn Central Railroad Corp. filed May 25 1989
Communication filed by John J. McCoy
May 25 1989
Communication filed by Docket dept. SS&P

Jul 31 1989
Pretrial statement of Deft. Little Miami Railroad Co.

Aug 11 1989
Annual Report Filed

Nov 8 1989
Affidavit of service by sheriff of Hamilton County

Nov 14 1989
Motion of the Little Miami Railroad Co. to dismiss filed

Jan 17 1990
Notice of appeal filed by Pltf. William Kuntz, III and copy(ies) mailed to the Appellee w/affidavit cf Wm. Kuntz.

To Court: Oct 08 1989
Pt. held

O.S.J. Vol. 1190 Pg 939

Notice Moved
Feb. 7, 1990
Pltf.-Appellant's a/b (illegible) and docketing statement (on the req. cal.), filed on CA No. 59136.

Feb 06 1990
Communication by American Research and Appraisal Center.

To Court: 12-8-89
Mot. of Little Miami R. Road Co. to dismiss is granted. O.S.J.
Notice Moved
Vol. 1210 Pg 916

The State of Ohio)
Cuyahoga County) SS.

I, Gerald E. Fuerst, Clerk of The court of Common Pleas within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original Appearance Docket Entry Case #7544.

Now on file in my office.

Witness by hand and seal of said court this 26 day of February A.D. 1990.

GERALD E. FUERST, Clerk
By KAREN FRANCE, Deputy

No. 90-748

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM KUNTZ, III,

Petitioner,

against

THE LITTLE MIAMI RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

John J. McCoy
Counsel of Record for Respondent
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
425 Walnut Street
Cincinnati, OH 45202
(513) 381-2838

Additional Counsel for Respondent:

Raymond W. Lembke
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
425 Walnut Street
Cincinnati, OH 45202
(513) 381-2838

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

PETITIONER'S FORMULATION OF QUESTION PRESENTED FOR REVIEW

That the Court of Appeals for the Eight [sic] District of Ohio at Cleveland denied petitioner equal protection under the United States Constitution between citizens of the various states by the application of a Local Rule of Court in dismissing his appeal from the Common Pleas Court of Cuyahoga County, Ohio.

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the dismissal of Petitioner's appeal to the Court of Appeals for the Eighth Appellate Judicial District of Ohio for non-compliance with a local rule of that Court, which rule explicitly states that non-compliance will be grounds for dismissal of an appeal, denied Petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

LISTING OF PARTIES

Respondent is the Little Miami Railroad Company which became a wholly-owned subsidiary of the Penn Central Corporation in 1979. Respondent has no subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statutes and Rules

STATEMENT OF THE CASE

This case is before the Court on the petition of William Kuntz III for a writ of certiorari directed to the Court of Appeals for the Eighth Appellate Judicial District of Ohio. The Petitioner asks this Court to review the February 2, 1990 order of the Ohio Court of Appeals dismissing Petitioner's appeal from the Court of Common Pleas of Cuyahoga County, Ohio for failure to comply with Rule 4(A) of the appellate court's local rules of practice. Petition for Certiorari, Appendix B at 10b-11b. Petitioner's motion for discretionary review and claimed appeal as of right to the Supreme Court of Ohio were denied and dismissed on June 27, 1990 because "no substantial constitutional question exists". Petition Appendix A.

Petitioner brought this action in the Court of Common Pleas of Cuyahoga County, Ohio seeking appraisal of his 50 "betterment" shares of Respondent Little Miami Railroad Company ("Little Miami") stock pursuant to Ohio Revised Code § 1707.85. Petitioner's Little Miami shares were extinguished as part of a merger between Little Miami and a wholly-owned subsidiary of Penn Central Corporation in late 1979. Petitioner rejected Little Miami's offer of $25.00 per share (total value of $1,250.00) and had demanded $4,000.00 per share (total value of $200,000.00). At Petitioner's request, the trial court appointed an appraiser pursuant to Ohio Revised Code § 1707.85. The court-appointed appraiser independently valued Petitioner's shares at $29.00 per share (total value of $1,450.00).

This case was scheduled for hearing on confirmation of the court-appointed appraiser's report on June 2, 1983. It became apparent at that hearing that Petitioner intended to offer numerous exhibits which had not been supplied to Little Miami and testimony from an expert witness who had not previously been identified to Little Miami or to the court. The trial court continued the hearing until September 19,

1983 and orally ordered the Petitioner to produce copies of his exhibits to Little Miami and to the court's appraiser, to identify his expert witness, and to produce copies to the expert's report. Petitioner failed to do any of this, resulting in the vacation of the September 19, 1983 hearing date.

This case was set for pretrial conference on August 7, 1989, after Petitioner had failed to take any action on the matter for six years. In violation of Cuyahoga County Common Pleas Court Rule of Practice 21, Petitioner did not file the pretrial statement required for this conference. During the pretrial conference the trial court again set dates by which Petitioner was required to produce his exhibits to Little Miami and ordered that Petitioner's expert witness be made available for deposition in accordance with Cuyahoga County Common Pleas Court rule of Practice 21.1(D). These orders were reduced to writing in an order entered upon the court's journal on October 6, 1989. Respondent's Appendix 1.

Petitioner disregarded the trial court's 1989 orders as well. Little Miami then moved for dismissal. Petition Appendix G. Petitioner failed to respond to Little Miami's motion to dismiss. Petition Appendix I at 5i-6i. Little Miami's motion to dismiss was granted by order journalized on December 8, 1989. Petition Appendix H.

On January 17, 1990, Petitioner filed a notice of appeal to the Court of Appeals for the Eighth Appellate Judicial District of Ohio. Petitioner's notice was filed late — 40 days after the entry of the final order of the Common Pleas Court and the issuance of notice thereof. Petition Appendix I at 5i-6i. *See* Ohio R. App. P. 4(A). Petitioner then failed to file a praecipe for transmittal of the trial court record as required by Eighth District Court of Appeals Rule 4(A). Petitioner's appeal was dismissed on February 5, 1990 in accordance with Rule 4. Petition Appendix C. The February 5 entry dismissing Petitioner's appeal granted Petitioner ten days to seek reconsideration. Petition Appendix B at 11b. Petitioner's motion for reconsideration was not filed until February 22, 1990. Peti-

tioner's motion for reconsideration was denied on March 12, 1990. Petition Appendix F. Petitioner then filed a notice of appeal to the Supreme Court of Ohio, appealing only from the February 5, 1990 dismissal of his appeal. Petition Appendix B at 8b.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

THE PETITION FOR CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW FOR DECISION BY THE COURT

Supreme Court Rule 10 instructs that,

> review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10 then goes on to list three situations illustrative of the type of special and important reasons which warrant certiorari. *See also National Labor Relations Bd.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."). Petitioner has made no effort to show that this case involves any of the special and important reasons for which the writ of certiorari is reserved. This case does not involve a decision of a United States Court of Appeals and Petitioner has made no showing that the state court decision of which he seeks review conflicts with the decision of any Federal Court of Appeals or of any other state court of last resort. Finally, as is demonstrated below, Petitioner's attempt to raise a Federal constitutional issue is foreclosed by prior decisions of the Court.

Petitioner asserts that the dismissal of his appeal pursuant to the Ohio Court of Appeals' Local Rule 4(A) denied him the equal protection of the laws guaranteed by the United States Constitution. *See* Petition for Certiorari at i. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*

v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985). *See also Parham* v. *Hughes*, 441 U.S. 347, 358 (1979) ("The function of [the equal protection clause] of the Constitution is to measure the validity of classifications created by state laws."). Rule 4(A) provides, in relevant part, as follows:

> The clerk of the trial court shall not prepare and assemble the documents constituting the record on appeal . . . unless and until appellant has filed a praecipe.
>
> If the appellant fails to file a praecipe within 10 days of filing the notice of appeal in the trial court, it will be grounds for dismissal of the appeal.

Eighth Appellate Judicial District Local Rule 4(A). Rule 4(A) does not create any classifications and does not make distinctions between persons similarly situated. All appellants in the Ohio Eighth District Court of Appeals are required to file a praecipe and all appellants face the penalty of dismissal of their appeal for failure to do so within the time limits prescribed. The record does not show, and Petitioner has not alleged, that Rule 4(A) was applied differently to him than it has been applied to other litigants. There is simply no issue of disparity of treatment. Thus, there is no equal protection issue. *See Blair* v. *Supreme Court of Wyoming*, 671 F.2d 389, 391 (10th Cir. 1982) (No 14th Amendment violation in state supreme court's dismissal of untimely appeal absent showing that other untimely appeals were allowed).

The basis for Petitioner's claim that he was denied equal protection of the law is difficult to discern from his Petition. Petitioner apparently bases his claim on the assertion that not all courts of appeals in Ohio have local rules identical to Eighth District Rule 4(A). *See* Petition at 5. Petitioner apparently believes that he had a constitutional right to rely upon the local rules of an Ohio appellate court other than the court in which his appeal was pending. *See* Petition Appendix B at 5b & 6b.

The twelve Ohio courts of appeals are authorized to adopt rules governing the practice before them by the Ohio Constitution, Ohio Const. art. IV § 5(B), and by the Ohio Rules of Appellate Procedure, Ohio R. App. P. 31.[1] There is no federal constitutional requirement that all twelve of these courts must adopt identical rules of practice. As the Court recently reiterated, " '[t]he Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state.' " *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462 (1988) (quoting *Fort Smith Light Co.* v. *Paving District*, 274 U.S. 387, 391 (1927)). *See also Witte* v. *Justices of New Hampshire Superior Court*, 831 F.2d 362, 364 (1st Cir. 1987) ("Nothing in the federal constitution requires states to have identical operations in each of their counties."). There is certainly no federal constitutional right to rely upon the rules of one court when litigating in a different court.

Petitioner also seems to argue that his Fourteenth Amendment rights were violated by the "Arcane Provision" of Ohio Revised Code § 1707.85 requiring his appraisal action to be filed in the county where Little Miami had its office. Petition at 4, 6-7. The Court has repeatedly held that there is no Fourteenth Amendment right to a particular venue within a state, stating that:

> "[I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. . . . It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail."

---

[1] The Ohio Rules of Appellate Procedure, applicable to all Ohio courts of appeals, plainly should have alerted Petitioner to the possible existence of local rules in the Eighth District Court of Appeals. *See* Ohio R.App. P. 31.

American Motorists Insurance Co. v. *Starnes*, 425 U.S. 637, 644-45 (1976) (quoting *Cincinnati Street Railway Co.* v. *Snell*, 193 U.S. 30, 36-37 (1904)). There is certainly no Fourteenth Amendment right to a particular forum merely because the judges therein may be more or less likely to rule in favor of a particular party. *See* Petition at 6-7.

Petitioner has no Fourteenth Amendment claim. " 'This Court has never held that States are required to establish avenues of appellate review,' " but has held only " 'that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.' " *Williams* v. *Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 310-311 (1966)). Eighth District Rule 4(A) does not unreasonably impede open and equal access to appellate review. The rule is a rational measure, applicable to any appeal, to ensure that the record to be reviewed is promptly and expeditiously assembled and transmitted to the Court of Appeals. States have a legitimate interest in providing for a prompt resolution of litigation. *Lindsey* v. *Normet*, 405 U.S. 56, 70 (1972).[2] Rule 4(A) permissibly places the burden on the party initiating an appeal to procure transmittal of the lower court's record. Similar requirements, with similar sanctions, exist in the rules of practice of several of the United States Courts of Appeals. Second Cir. Civil Appeals Management Plan ¶¶3 & 7(a); Third Cir. R. 15; Sixth Cir. R. 13(a).

Petitioner's equal protection claim is fatally defective on another ground as well. The Court has recognized "the basic principle that [one] who alleges an equal protection violation has the burden of proving 'the existence of purposeful

---

[2] The Ohio Supreme Court has observed that the system of local rules of the Eighth District Court of Appeals "enables that court to get right to the focal point of each case and expedite the orderly flow of its business, thus vidicating the public's interest in the prompt and efficient dispatch of justice." *DeHart* v. *Aetna Life Insurance Co.*, 69 Ohio St. 2d 189, 191, 431 N.E.2d 644, 646 (1982).

discrimination'." *McClesky* v. *Kemp*, 481 U.S. 279, 292 (1987) (quoting *Whitus* v. *Georgia*, 385 U.S. 545, 550 (1967)). *See also Joyce* v. *Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986) ("The equal protection argument fails here because the wrong is not alleged to be directed toward an individual as a member of a class or group singled out for discriminatory treatment."). Petitioner has not shown, nor even contended, that Eighth District Rule 4(A) singles out any identifiable group or class for purposeful discrimination, either on its face or as applied. It may be that it is somewhat more difficult for a non-resident to obtain access to the local rules of any state court; however, that fact does not mean that the existence of local rules equally applicable to residents and non-residents is impermissibly discriminatory.[3]

Petitioner further appears to contend that dismissal of his appeal violates some Ohio policy against using dismissal as a sanction for non-compliance with "technical" court rules, relying on *O'Brien* v. *Stein*, 47 Ohio App. 3d 191, 547 N.E.2d 1213 (Franklin County), *motion to certify overruled*, 39 Ohio St. 3d 710, 534 N.E.2d 79 (1988), *cert. denied*, ____ U.S. ____, 110 S.Ct. 51 (1989). There is no such Ohio policy. *O'Brien* v. *Stein* does not hold that appeals cannot be dismissed for failure to comply with local rules, only that the violations present in that case did not warrant dismissal.[4] Petitioner's "policy" argument further ignores the pronouncement of the Ohio Supreme Court in *Vorisek* v. *Village of North Randall*, 64 Ohio St. 2d 62, 413 N.E.2d 793 (1980), that,

---

[3] Further, it is questionable whether it is truly any more difficult for a non-resident to obtain access to the local rules of the Ohio courts of appeals than it is for a non-resident to obtain access to the rules of civil and appellate procedure applicable throughout the state. Both the local courts of appeals' rules and the rules of civil and appellate procedure promulgated by the Ohio Supreme Court for application throughout Ohio are commercially available in a single volume. *See e.g.*, Ohio Rules of Court — State (West, published annually).

[4] It should further be noted that the summary judgment which was the subject of the appeal in *O'Brien* v. *Stein* was affirmed by the Ohio Tenth

> While the sanction of dismissal is an extreme measure, not to be indiscriminately applied, the line must be drawn so that Local Rules continue to be respected and the threat of sanctions continues to be an effective deterrent to rampant disregard of those rules.

64 Ohio St. 2d at 65, 413 N.E.2d at 795. In short, there is no Ohio policy which was applied to Petitioner in a discriminatory fashion. *See also Cassidy* v. *Glossip*, 12 Ohio St. 2d 17, 25-26, 231 N.E.2d 64, 69 (1967) (rejecting contention that Ohio trial courts cannot adopt a local rule unless such rule is adopted statewide).

This Court declared 60 years ago, that

> [t]he due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. . . . Nor does the equal protection clause exact uniformity of procedure.

Dohany v. *Rogers*, 281 U.S. 362, 369 (1930). The Petitioner has not shown a constitutional infirmity in the Ohio court's Local Rule 4(A). Unquestionably, Petitioner is not in as good a position as an appellant who took the trouble to learn and obey the Ohio court's rules. However, "the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979). Eighth District Rule 4(A) is an equal law.

Leaving aside the merits of Petitioner's contentions, Petitioner has not demonstrated any reason why certiorari should be granted in this case. No conflict among lower courts has

---

District Court of Appeals as part of its published decision in that case. It should also be noted that in *DeHart* v. *Aetna Life Insurance Co.*, 69 Ohio St. 2d 189, 431 N.E.2d 44 (1982), cited in the Petition, the appellant's counsel *had* filed the praecipe required by the local rule but had inadvertently marked an incorrect box on the praecipe form. 69 Ohio St. 2d at 189, 431 N.E.2d at 645.

been shown. No issue of public importance has been identified. At most, Petitioner seeks a decision from this Court that would necessarily be limited to particular facts of this case. Petitioner has not shown that this is a constitutional issue of general public importance. When the Court's prior Fourteenth Amendment decisions are examined, it is plain that Petitioner has shown no constitutional issue at all.

Petitioner William Kuntz III's Petition for a Writ of Certiorari should be denied. Petitioner has failed to demonstrate the existence of even an arguable deprivation of a federal constitutional right, much less a question so important as to warrant review by the Supreme Court of the United States.

CONCLUSION

For the reasons set forth below, the Petition for Certiorari of Petitioner William Kuntz, III should be denied.

Respectfully submitted,

John J. McCoy
Counsel of Record for Respondent
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
Cincinnati, OH 45202
(513) 381-2838

Additional Counsel for Respondent:

Raymond W. Lembke
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
425 Walnut Street
Cincinnati, OH 45202
(513) 381-2838

APPENDIX

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

CASE NO. 80-07544

JUDGE TIMOTHY E. McMONAGLE

WILLIAM KUNTZ, III,

Plaintiff,

v.

LITTLE MIAMI RAILROAD COMPANY,

Defendant.

ORDER
(Filed October 6, 1989)

On August 7, 1989, counsel for plaintiff and defendant appeared for a pretrial before the Court. At such pretrial the Court ordered:

1. Plaintiff's Counsel to forward plaintiff's original trial exhibits to defendant's Counsel's office (Taft, Stettinius & Hollister, 1800 Star Bank Center, Cincinnati, Ohio) by no later than September 8, 1989, along with a list of trial exhibits in the order that plaintiff will use them at trial;

2. Plaintiff's Counsel to make Mr. Pike Levine, plaintiff's expert, available at plaintiff's costs for deposition at defendant's Counsel's office prior to November 8, 1989;

3. Future expenses of the Court appointed appraiser initially shall be advanced in equal shares by plaintiff and defendant, with such expenses to be taxed as costs and assessed by the Court after the hearing.

4. A final pretrial to be held November 20, 1989, with the hearing on confirmation of appraiser's report to be scheduled promptly thereafter.

IT IS SO ORDERED.

/s/ TIMOTHY E. McMONAGLE
Judge

Dated 10-5-89